

No 7.

An apparent heir-male passing by his immediate predecessor, who had been three years in possession of the estate without infestment, and serving heir to a remoter last infest, cannot be pursued for payment of his immediate predecessor's debt, till the heir of line be discussed.

1712. November 13. JOHN VINT *against* The EARL of DALHOUSIE.

IN this action, mentioned *supra* 8th November instant, *voce* HEIR CUM BENEFICIO, the Lady Hawley being decerned as heir of line to the late Earl of Dalhousie, to dispo to the pursuer, for security of his debt, the inventory of the defunct's estate, the pursuer insisted for payment against William, now Earl of Dalhousie, upon the act of Parliament 1695; because he, passing by the defunct, his immediate predecessor, who was three years in possession of the estate, had served heir-male to a remoter predecessor, and consequently was liable for the debts of the interjected person to the value of that estate.

THE LORDS found, That the defender being only apparent heir-male to the pursuer's debtor, can only be liable *suo ordine*, after the heir of line is first discussed. For the act of Parliament doth not take away from an apparent heir the privilege of discussing, that would be competent to him if served.

Fol. Dic. v. 1. p. 245. Forbes, p. 631.

S E C T. II.

No Benefit of Discussion betwixt Heir and Executor.

1609. December 14.

GRAY *against* CRAIG.

No 8.

A man being bound to infest his wife in an annualrent, and at his decease, not being of that estate that he can have an heir, the party was found to have action against his executors, although the bond was heritable, and only proper against an heir, if any there were.

GRAY, the relict of Craig, pursued Craig, her own son, as executor and universal intromitter with the goods of her umquhile husband, to fulfil to her her contract of marriage; and, to that effect, to bestow 1000 merks upon land or annualrent to her in liferent. It was *excepted*, That no process could be granted against this defender, as executor or intromitter, &c. because this part of the contract of marriage was heritable properting infestment, and the executors could not be pursued to that effect, but only the defunct's heir.—It was *answered*, That the defunct could not have any heir, neither being prelate, baron, nor burgess, and so he not having an heir, this pursuer had good interest to pursue the intromitters with his gear, to fulfil the contract tocher. In respect whereof, the LORDS repelled the exception.

Fol. Dic. v. 1. p. 246. Haddington, MS. No 1690.

* * * The like was decided, 16th January 1610, Spence against Reid, *voce* CONSUEUDE, No 3. p. 3092.